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No. 88-1781

In The

Supreme Court of the United States

October Term, 1988

THE ALGOMA STEEL CORPORATION, LIMITED,

Petitioner,

v.

THE UNITED STATES and U.S. INTERNATIONAL TRADE COMMISSION,

Respondents,

and

LONE STAR STEEL COMPANY,

Respondent,

IPSCO, INC. AND IPSCO STEEL, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL H. STEIN*

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
1775 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 429-2303

Counsel for Respondent

*Counsel of Record

June 6, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In conducting its material injury investigation under Title VII of the Tariff Act of 1930, did the U.S. International Trade Commission err as a matter of law in investigating the effects on a domestic industry of all of the imports found by the Department of Commerce to be sold, or likely to be sold, at less than fair value?[1]

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[1] In accordance with Rule 28.1 of the Rules of this Court, Lone Star Steel Company is a subsidiary of Lone Star Technologies, Inc.

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STATEMENT OF FACTS

The facts of this case are not in dispute. Briefly, after making the investigation prescribed by statute, the Department of Commerce determined that oil country tubular goods (OCTG) from Canada were being, or were likely to be, sold at less than fair value in the United States. The Department's determination stated:

> **Final Determination**
>
> Based upon our investigation, we have determined that *OCTG from Canada* are being, or are likely to be, sold in the United States at less than fair value . . . We made fair value comparisons on approximately 83 percent of the sales of the class or kind of merchandise to the United States during the period of investigation.
>
> . . . .
>
> Since Welded Tube had no sales at less than fair value, that company is *excluded from this final determination of sales at less than fair value.*

51 Fed. Reg. 15029 (April 22, 1986) (emphasis supplied).[2]

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[2] Section 731 of the Tariff Act of 1930, 19 U.S.C. § 1673, provides that the Department of Commerce is to determine whether a class or kind of merchandise is being sold, or is likely to be sold, at less than fair value. If that decision is in the affirmative, the United States International Trade Commission then determines whether an industry in the United States is materially injured, or threatened with material injury, by reason of imports of that merchandise. If that answer is in the affirmative, an estimated antidumping duty is paid on all further importations of the merchandise, until each individual entry can be reviewed to determine whether it has been sold at less than fair value. Section 751 of the Tariff Act, 19 U.S.C. § 1675.

The United States International Trade Commission, following its ordinary investigative methodology, made an affirmative determination in its injury investigation.[3] In doing so, the Commission considered as the imports allegedly causing the injury the entire class of merchandise that the Commerce Department had determined was being sold at less than fair value, that is, all OCTG imported from Canada except for OCTG manufactured by Welded Tube. It rejected Algoma's argument that it should have segregated and considered noninjurious the individual transactions during the investigative period for which the Department of Commerce had determined there were no dumping margins.

The Court of International Trade upheld the Commission determination, and the Court of Appeals for the Federal Circuit affirmed.

ARGUMENT

I. TITLE VII REQUIRES THE COMMISSION TO ASSESS INJURY BY REASON OF THE CLASS OR KIND OF MERCHANDISE DESCRIBED IN THE COMMERCE DEPARTMENT'S AFFIRMATIVE DETERMINATION

The Court of Appeals for the Federal Circuit correctly determined that the Commission followed the statutory

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[3] Oil Country Tubular Goods from Canada and Taiwan, USITC Pub. 1865, Inv. Nos. 701-TA-255, 731-TA-276-77 (Final) (June 1986).

scheme by considering all imports found by the Commerce Department to be sold, or likely to be sold, at less than fair value when making its injury analysis. The statute governing the conduct of material injury investigations could scarcely be clearer in requiring the Commission to accept the Commerce Department's determination regarding the imports to be investigated. Section 731 of the Tariff Act of 1930, 19 U.S.C. § 1671 provides (emphasis supplied):

> If –
>
> (1) the administering authority determines that *a class or kind of foreign merchandise* is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that –
>
> (A) an industry in the United States –
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury,
>
> . . .
>
> *by reason of imports of that merchandise,*
>
> then there shall be imposed upon such merchandise an antidumping duty . . .

The only sensible reading of the statute is that the "class or kind of foreign merchandise" determined to be sold at less than fair value is "that merchandise" by reason of which the Commission must determine injury.

In this case, the Commerce Department made the following determination:

Final Determination

> Based upon our investigation, we have determined that *OCTG from Canada* are being, or are likely to be, sold in the United States at less than fair value . . . We made fair value comparisons on approximately 83 percent of the sales of the class or kind of merchandise to the United States during the period of investigation.
>
> . . . .
>
> Since Welded Tube had no sales at less than fair value, that company is *excluded from this final determination of sales at less than fair value.*

51 Fed. Reg. 15029 (April 22, 1986) (emphasis supplied). The class or kind of merchandise with respect to which the Commerce Department made an affirmative determination is OCTG from Canada, excepting OCTG manufactured by Welded Tube.[4] The statute requires the Commission to consider whether the domestic industry producing OCTG (the like product) is materially injured by reason of imports of OCTG from Canada, excepting the OCTG produced by Welded Tube.

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[4] The class or kind of merchandise is delineated by the type of product under investigation and by country of origin. Both the concept of a "class or kind" of merchandise, and country of origin have their origins in Customs law. However, neither Commerce nor the Commission are bound by Customs interpretations in defining categories of merchandise for purposes of the antidumping law. *Royal Business Machines, Inc. v. United States*, 1 CIT 80, 507 F.Supp. 1007, 1014 n. 18 (1980), *aff'd* 669 F. 2d 692 (C.C.P.A. 1982). Commerce has broad authority to define the scope of the class or kind of merchandise under investigation. *Diversified Products Corp. v. United States*, 6 CIT 155, 572 F. Supp. 883 (1983).

The procedural portion of the Tariff Act is equally plain. Section 735 of the Act, 19 U.S.C. § 1673d(b)(1), requires that the Commission determine whether there is material injury or threat of material injury "by reason of imports of the merchandise *with respect to which the administering authority has made an affirmative determination . . .*" (emphasis supplied). Commerce's affirmative determination in this case covers all OCTG from Canada except Welded Tube's. That is the merchandise on which the Commission's decision must be based.

The Commerce Department's affirmative determination that OCTG is being, or is likely to be, sold at less than fair value may have been based upon a finding that a goodly proportion, rather than all, sales during the period of investigation were at LTFV. Nonetheless, the determination covers more than just the LTFV sales during the period of investigation. The Commission is not free to pick and choose among the merchandise covered by Commerce's affirmative determination. The Commission cannot consider only certain sales of the merchandise.

As the statute is clear on the point, the inquiry can end here. However, for completeness, we will show why this statutory scheme makes sense.

II. THE CURRENT ALLOCATION OF FUNCTIONS BETWEEN COMMERCE AND THE COMMISSION ACCORDS WITH TITLE VII

The Commerce Department makes its determinations with respect to an entire class or kind of merchandise subject to an investigation, not simply with respect to

those transactions actually recorded as being below fair value. The Department, in addition, exercises its power to exclude imports by companies found not to be selling at LTFV. It must do this, because its statutory mandate is to determine whether a class or kind of merchandise is being dumped, *or is likely to be dumped*, not whether certain transactions have been below fair value. That latter inquiry forms the basis of the Department's decision whether the class or kind of merchandise is being, or is likely to be, sold at less than fair value.

The Department reaches its determination of whether an entire class or kind of merchandise is being sold at LTFV by examining a representative sample of sales over a representative time period, generally at least 60 percent of sales during the month in which a petition is filed and the five preceding months. 19 C.F.R. § 353.42(b) (54 Fed. Reg. 12786, March 28, 1989). It is neither required to, nor does it, examine all sales of the subject imports which occurred during that period in order to reach its determination. It examines such sales on a company-by-company basis.

It is important to recognize that the determination is made for the purpose of deciding whether *future* imports of the merchandise under investigation should be examined to determine if they are being sold at LTFV. Commerce's initial investigation results in no actual duty collections on the sales examined.

Thus the point of the Department's investigation is not, as Algoma suggests, to determine whether certain particular sales were at LTFV. Rather the purpose is to determine whether enough of the merchandise under

investigation is being sold at LTFV during a representative period to warrant investigating *all* future import transactions relating to this merchandise.[5]

A second purpose of the Department's investigation is to determine the deposit rate for sales that will be entering the United States during the following year. This is the primary function and purpose of calculating the weighted average dumping margin.[6] Each company investigated by Commerce will have its own specific weighted average margin. It pays estimated duties in the amount of its margins. Companies that import the product under investigation, but were not investigated, are required to post a deposit in the amount of the weighted average margin for all sales examined from that country.

In sum, the significance Algoma would have this Court attach to the LTFV sales found by Commerce in an initial investigation is totally different from the significance the statute mandates the Commerce Department to attach to those sales, and would result in gross discrepancies between the imports covered by Commerce's final determination and the imports examined by the Commission.

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[5] When imports which enter the United States are subject to an antidumping duty order, the importer is required to post a cash deposit to cover any antidumping duties that may be assessed once Commerce reviews the specific transaction, which it does annually. Once Commerce determines the actual antidumping duty amount on the particular sale, the estimated duty deposited is refunded or augmented, as the case may be. 19 U.S.C. § 1673e.

[6] A description of the Commerce Department's method for determining the weighted average dumping margin is presented in the Appendix to this petition.

III. NEITHER LEGISLATIVE HISTORY NOR THE ANTIDUMPING CODE REQUIRES A DIFFERENT RESULT

Petitioner can cite any number of statements in the legislative history to Title VII of the Tariff Act or to the GATT Antidumping Code[7] to the effect that an affirmative injury finding may not be based upon the effect of fairly traded imports. What petitioner refuses to recognize is the OCTG it exported to the United States was found to be unfairly traded, even though some individual shipments were at undumped prices. This is because the Commerce Department must determine whether a *class* of merchandise warrants further investigation, if the Commission determines there is sufficient injury to require it. In this case, had the Commission determined injury by reason of Welded Tube's imports, it would have acted contrary to the legislative history and the Code, because it would have assessed causation by reason of fairly traded imports. Both the Congress and our trading partners fully understand that the phrase "dumped imports" means the class of imports subject to an affirmative determination, not simply those investigated transactions found to have margins. This is evidenced by the fact that during the ten years that the Commission has been administering Title VII, this is the first time that this issue has even been raised.

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[7] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, April 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL H. STEIN
Counsel for Respondent
Lone Star Steel Company

June 6, 1989

APPENDIX

Calculation of the Weighted Average Dumping Margin

The weighted average dumping margin is calculated by compiling the results of all sales examined, both those made at fair value and those made at LTFV. Only if the weighted average margin is more than *de minimis* will Commerce subject a company, or country, to an anti-dumping duty order. Thus, through the calculation of the weighted average dumping margin, Commerce considers all of the evidence in front of it in determining whether the class or kind of merchandise is being, or is likely to be, sold at LTFV.

In this context, it is useful to recall how the Department actually calculates margins, to show how the Department ultimately decides whether a class or kind of merchandise is being dumped, or is likely to be dumped.

The foreign market value is compared to the U.S. price of the sales being examined that the foreign producers/exporters made to U.S. purchasers during the six-month period of investigation. In order to make comparisons, Commerce converts the foreign market value into U.S. dollars. After conversions are made, the converted foreign market values are compared to the U.S. prices.

For any transaction for which the U.S. price is greater than the foreign market value, the dumping margin is zero. For any transaction for which the foreign market value is greater than the U.S. price, the dumping margin is the difference between the foreign market value and the U.S. price divided by the U.S. price. The following table illustrates the practice:

Transaction Number	U.S. Price	Foreign Market Value	Margin of Dumping
1.	1.50	2.20	46.7%
2.	2.20	2.20	0.0
3.	2.40	2.20	0.0
4.	2.00	2.20	10.0%

After these transaction-by-transaction dumping margins have been calculated, the Department calculates a weighted average dumping margin for each of the foreign producers/exporters, as follows:

Transaction Number	(a) Margin of Dumping	(b) Total Value of Transaction	(a) x (b) / 100
1.	46.7%	$ 900	420.30
2.	0	$1000	0
3.	0	$ 200	0
4.	10.0%	$1200	120.00
		$3300	$540.30

Weighted average Margin of Dumping = $\frac{540.30}{3300.00}$ X (100) = 16.4%

If the weighted average dumping margin is 0.5 percent or greater for any company, then the Department makes an affirmative determination of less than fair value sales. If the weighted average margin for any company is less than 0.5 percent, the Department considers this to be *de minimis*, and will exclude those companies with *de minimis* margins upon receipt of timely requests for exclusion.